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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-656

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 50; PACIFIC MARITIME ASSOCIATION and NATIONAL LABOR RELATIONS BOARD,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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November 27, 1974

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INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 50; PACIFIC MARITIME ASSOCIATION and NATIONAL LABOR RELATIONS BOARD,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, International Union of Operating Engineers, Local 701, hereby requests the issuance of an order granting certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this pro-

ceeding on August 29, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit dated August 29, 1974 has not yet been reported. It is reprinted in the Appendix hereto, p. 1a infra. The Decision and Determination of Dispute of the National Labor Relations Board, hereinafter called "Board", has been reported at 181 NLRB 51, 73 LLRM 1369 (1970). It is reprinted in the Appendix hereto, p. 20a, infra.

JURISDICTION

The petitioner union, International Union of Operating Engineers, Local 701, hereinafter called "Operating Engineers 701" filed a charge against International Longshoremen's & Warehousemen's Union Local 50, hereinafter called "Longshoremen 50" under § 8(b)4(D) of the Labor Management Relations Act, 29 USC § 158(b)4(D),

alleging that Longshoremen 50 stopped work until the work of operating the floating cranes was transferred from Operating Engineers 701 to Longshoremen 50. The National Labor Relations Board, held a hearing under § 10(k) of the Labor Management Relations Act, 29 USC § 160(k) and awarded the work of operating the floating cranes to Operating Engineers 701. The Board then issued a complaint against Longshoremen 50 under § 8 (b)4(D) of the Act and found Longshoremen 50 guilty of violating the Act. The Board then petitioned for enforcement of its order. The Ninth Circuit denied the Board's petition for enforcement and remanded the case to the Board for further proceedings. This petition for writ of certiorari has been filed within 90 days from the entry of the Ninth Circuit's judgment of August 29, 1974. The

jurisdiction of this Court is invoked under 28 USC § 1254(1).

QUESTIONS PRESENTED

1. May the Ninth Circuit reverse the 13-year practice of the Board in awarding work in § 10(k) cases based on "common sense and experience?"

2. May the Ninth Circuit reverse a § 10(k) award which is supported by substantial evidence on the record considered as a whole?

3. May the Ninth Circuit require the Board to accept the findings of an arbitrator based on false testimony in a proceeding which excluded one of the parties to the dispute?

4. May the Ninth Circuit increase the role of the judiciary in deciding § 10(k) cases without directions from Congress or this Court?

STATUTORY PROVISIONS INVOLVED

Section 10(k) of the Labor Management Relations Act, 29 USC § 160(k):

> "(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

* * * * * * * * * * *

Section 8(b)4(D) of the Labor Management Relations Act, 29 USC 8(b)(4)(D):

> "(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in

another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:"

* * * * * * * * * * *

Section 10(e) of the Labor Management Relations Act, 29 USC § 160(e):

"(e).....Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive....."

* * * * * * * * * * *

STATEMENT OF THE CASE

This controversy involves a work dispute under § 10(k) of the Labor-Management Relations Act. This case presents the issue of who should operate the floating cranes loading logs from water to ship in the port of Astoria, Oregon, at the mouth of the Columbia River.

The unions claiming the work are Local 701, International Union of Operating Engineers, AFL-CIO, and Local 50, International Longshoremen's & Warehousemen's Union. Both local unions have stated on the record that only the locals and not the internationals are the parties to this dispute. Operating Engineers 701 has members throughout Oregon and the five and one-half counties of Southwest Washington. No member of Longshoremen's 50 testified in this hearing, but the local is based in Astoria and maintains about ten gangs so probably has 100

to 150 active members.

In early April 1969 a sister Longshore local in Portland, Oregon objected to an employer hiring members of Operating Engineers 701 to load a ship at the Rivergate dock just north of Portland. In retaliation, Longshoremen 50 struck the port of Astoria on April 3, 1969 demanding that the work of the floating cranes be taken away from Operating Engineers 701 and given to them. The strike was effective - inexperienced trainees of Longshoremen 50 were put on the floating cranes and have been attempting to operate them ever since.

It may be that there has never been a case presented to this Board in which one of the claimants for the work in dispute had less experience doing the work in question and presented less of a factual case in the hearing.

Before 1964, Astoria was a depressed

port. From 1946 to 1964 there was only one crane in the port of Astoria loading cargo. This was a 47-1/2 ton capacity locomotive crane which moved on tracks on the dock. It was used to load logs, pilings, pulp, steel and other cargo whenever the small ships' cranes could not handle the loads. Logs were loaded by this crane at different times from the water to the ship, from the water to the dock and then from the dock to the ship, and from the dock onto railroad cars.

All of the cargo loading in the port of Astoria during this period was irregular, depending upon the number of ships in port. The locomotive crane sometimes loaded logs steadily for periods up to two months. From 1946 to 1967 the operator of this locomotive crane was Ernie Sunnell, a member of Operating Engineers 701. No longshoreman ever operated this crane during this period.

After Sunnell retired in 1967 the crane was operated until 1969 by Gibbs Marxson, also a member of Operating Engineers 701. No longshoreman operated this crane during this period except for one longshoreman who operated it for two days in 1968.

In 1964 the floating cranes started to come down to Astoria for log loading. In the beginning they would come down from Portland or other Oregon or Southwest Washington ports to load specific ships. Gradually, from 1964 until 1967 the number and frequency of Japanese ships increased. In 1967 the floating cranes were chartered to the stevedore companies and from then until April 3, 1969 stayed in Astoria most of the time though they continue to do other work when log ships are not available. From the time the floating cranes first came to Astoria in 1964 until April 3, 1969 when the Longshoremen struck the port the

floating cranes were always operated by Operating Engineers 701. No Longshoreman ever operated a floating crane in the port of Astoria until after this dispute arose on April 3, 1969.

On April 3, 1969 at 8'oclock a.m. the Operating Engineers 701 crane operators went to their floating cranes as they had for the past five years and lowered the slings into the water. The members of Longshoremen 50 refused to hook up the bundles of logs onto the slings. Then, about 8:30 in the morning, the local manager of the Brady-Hamilton Stevedore Company told the operators on the Willamette-Western cranes that they were fired and they should take their gear and get off the cranes. A little later that day the manager of W. J. Jones and Son told the General Construction Company crane operators that they would not be needed any more. The Longshoremen immediately

went aboard the Willamette-Western cranes and started to figure out how to operate them. Jones did not attempt to operate floating cranes for several months but continued to do the work with winches on the ships being loaded. When Brady-Hamilton and Jones asked the Longshoremen why they had stopped work they replied because of health and safety.

It soon developed that they had no complaint other than that they felt it was not safe to work under a floating crane operator belonging to Operating Engineers 701 because of jurisdictional disputes that a sister longshore union was having with Operating Engineers 701 in Portland, Oregon.

Brady-Hamilton and Jones were members of the Pacific Maritime Association which had a contract with the longshoremen up and down the west coast. They asked for an im-

mediate arbitration under the terms of that contract and the arbitrator decided that there was no legitimate health and safety dispute. Jones and Brady could then have insisted that the longshoremen return to work in the same manner as they were working before the dispute, pending further arbitration of any other claims. Instead of that, even before the arbitrator's decision they immediately turned the jobs over to the longshoremen.

On April 3, 1969 there were ten floating cranes loading logs in Astoria, Oregon. Four were owned by Willamette-Western Corporation; four by General Construction Company and two by Umpqua River Navigation. These cranes have boom lengths of approximately 125-145 feet and can pick up loads of up to 45 tons up to 90 feet away. They are mounted on barges about 100-110 feet in length and 45 feet in width. Most of them

were rebuilt for the specific purpose of loading bundles of logs from rafts in the water in the holds of ships. Though some of them were built as far back as World War II they were all in good operating condition. The value of the cranes ranged from $250,000 to $650,000.

Each of these cranes had a name, a tradition, and an operator who had been with the same crane for years. The cranes - Beaver, Barge 32, Portland, Frisco, Zeus, Titan, Sampson, Goliath and Umpqua Beaver - operated all over the ports of Oregon and the five and one-half counties of Southwest Washington. These cranes and their operators helped build the enormous John Day Dam up-river on the Columbia; they drove the pilings for the Astoria Bridge that connects Oregon and Washington; and they made possible the increased Japanese log trade by loading huge bundles of logs safely and quickly.

There are many cranes in use in modern industry. Cranes are used in logging in the forests of the Pacific Northwest; cranes are used to build new skyscrapers in Portland, Oregon; cranes are used on the docks to load and unload cargo. A few cranes are mounted on barges. In Oregon and the five and one-half counties of Southwest Washington most of the cranes, large and small, are operated by a member of Local 701 Operating Engineers.

Of all the cranes in use in this area, the floating cranes require the greatest skill to operate because they are used to lift very heavy loads and operate from a shifting floating barge bobbing in the water. Lifting bundles of logs from raft to ship with a floating crane requires great skill because 25-ton bundles of wet, slippery logs are constantly being lifted over men's heads. First the sling must be

moved through the air a distance of up to 180 feet. The bundle of logs to be picked up is invariably in a different position from the previous bundle. The crane barge is bobbing in the water and the sling must be presented motionless to the longshoremen.

Then, after the longshoremen on the raft in the water tie the sling to the bundle of logs, the crane operator must lift the bundle without knowing its true weight since it is partially submerged in water. When the 25 tons of logs are picked up in the air this lists the crane to one side and causes a bobbing in the water in addition to the existing action of the tide.

The floating crane has three separate operations, hoisting, booming and swinging. Hosting means lifting the load with the line; booming means lifting or raising the boom from which the line is hung

and swinging means swinging the whole crane up to 360° on the barge. The floating crane operator has nine hand controls and three foot controls to operate. There is no mechanical connection between the controls that do the hoisting, booming and swinging. To get the load from the water to a position above the hold of a ship with adequate speed the experienced floating crane operator must hoist, boom and swing at the same time, coordinating the three separate motions. The floating crane operator must pick the load up in the air, raise it above the level of the ship and move the load over whatever hatch is then being loaded.

In the third phase of the operation the load has to be deposited in the hatch, usually in a place which cannot be seen by the floating crane operator. The operator must take signals from a hatchtender concerning

the lowering and placing of the load, while at the same time remembering the capabilities of the crane.

When the load is released the crane bobs in the water with its stability helped by a counterweight. Even though 25-45 tons of weight have just been released, the floating crane operator must clear the hatch and the side of the ship without doing any damage to property or personnel and get the sling back to the raft and present it motionless.

On April 3, 1969 there were eleven Operating Engineers 701 crane operators and ten Operating Engineers 701 firemen or oilers working the floating cranes in Astoria. Each was a skilled craftsman with years of experience. On April 3, 1969 there was no member of Longshoremen 50 who had ever operated a floating crane or a land crane (one longshoreman operated a land crane for two days in 1968). No Long-

shoreman had any experience firing the boilers of steam cranes or acting as an oiler on diesel cranes.

The facts as developed in the 17 day hearing before the Board may be summarized as follows:

1. Operating Engineers 701 operated the cranes in Astoria from 1946 until the day this jurisdictional dispute started on April 3, 1969. Longshoremen 50 had never operated the cranes in Astoria.

2. Operating Engineers 701 had skilled, competent operators of the floating cranes which are most difficult machines to operate and require years of experience. Longshoremen 50 had no one who ever operated a floating crane.

3. Operating Engineers 701 can operate the floating cranes more economically because they can maintain and service the cranes, rebuild them and overhaul them

while the cranes are not working and do other work with the floating cranes while there is no cargo available. Longshoremen 50 have no comparable experience. Furthermore, Operating Engineers 701 operate the steam cranes with one operator and one fireman, while Longshoremen 50, after April 3, 1969, required two operators and a fireman for a steam crane.

4. Longshoremen 50 did more damage to the floating cranes in the few months of partial operation between April 3, 1969 and the date of the Board hearing than Operating Engineers 701 did in the previous five years of continuous operation.

5. Operating Engineers 701 operate almost all of the floating cranes in use in West Coast ports. Before April 3, 1969, the only floating cranes operated by longshoremen on the entire West Coast were one steam crane in Portland, Oregon, plus

another steam crane part of the time in Portland and possibly one crane in Port Angeles, Washington. All other floating cranes on the West Coast have been operated by operating engineers.

6. Longshoremen 50 had long acquiesced in the work assignment of the floating cranes in Astoria to Operating Engineers 701. Before April 3, 1969, the members of Operating Engineers 701 who operated the floating cranes and the members of Longshoremen 50 who hooked up the cranes and stowed the logs in the hold of the ship worked closely together in harmony.

7. All employers who stated a preference at the Board hearing preferred to have the floating cranes operated by Operating Engineers 701. Preferences for Operating Engineers 701 were stated by Willamette Western and General Construction who owned the cranes and leased them to the two steve-

dore companies. The only witness from Jones Stevedore Company who testified was the Astoria manager who was neutral. No one from Brady-Hamilton Stevedore Company testified at the Board hearing.

8. The contract between the Longshoremen and Pacific Maritime Association excluded the floating cranes from being longshore tools. In subsequent Joint Committee meetings between the Pacific Maritime Association and the Longshoremen up and down the West Coast, Pacific Maritime Association at all times contended that the floating crane was not a longshore tool and resisted taking floating crane work away from skilled non-longshoremen. The stevedore companies and the crane owning companies were co-employers of Operating Engineers 701. 1/

1/ Co-employer status was found by the United States District Court for the District of Oregon in Henderson v. Operating Engineers 701 and Longshoremen 50, Case No. 69-258 (1972)

As co-employers, the stevedore companies were bound by the Operating Engineers 701 collective bargaining contract to employ persons dispatched from the Operating Engineers hiring hall.

9. After the work stoppage by Longshoremen 50 of April 3, 1969, and after the § 8(b)4(D) charge was filed by Operating Engineers 701, Longshoremen 50 and the Pacific Maritime Association submitted to their arbitrator the question of whether floating cranes in Astoria should be run by members of Longshoremen 50. Operating Engineers 701 was excluded from this proceeding. At that arbitration proceeding, both parties contended that the work belonged to Longshoremen 50. At the arbitrator's hearing, neither party submitted to the arbitrator the memoranda of joint committee meetings which showed that at all times prior to April 3, 1969

Pacific Maritime Association had contended that operating the floating cranes was not longshore work. Neither party in the arbitration informed the arbitrator that there was not a single longshoremen in the Port of Astoria with any experience operating either a floating crane or a land crane. The arbitrator's opinion recites that he received an affidavit stating that there were longshoremen in the Port of Astoria with the skills and experience to operate these floating cranes.

This affidavit upon which the arbitrator relied was false and is contradicted by the evidence before the Board and admissions made on April 3, 1969 by a Longshoremen 50 Labor Relations Committee member.

After the Longshoremen 50 work stoppage on April 3, 1969, and the employer transfer of the floating crane work to Longshoremen

50, Operating Engineers 701 filed an § 8(b)4(D) charge and the jurisdictional dispute § 10(k) case came on for a 17 day hearing before a Hearing Officer of the Board. The Board in its Decision and Determination Award unanimously gave the work to Operating Engineers 701. Longshoremen 50 refused to comply and the Board issued a complaint charging Longshoremen 50 with a violation of § 8(b)4(D) of the Act. A three day hearing followed, after which the Board unanimously found Longshoremen 50 guilty of violating § 8(b)4(D). Longshoremen 50 refused to comply with the orders of the Board contained in the decision and the Board sought enforcement under 29 USC § 160(e).

The Court of Appeals for the Ninth Circuit has now vacated the decision of the Board on the grounds that:

1) The Board's Finding of Fact (called

a Conclusion of Law by the court) that Longshoremen 50 had a better contract claim for the work was in error, since the Board refused to rely on the award made by the Longshore industry arbitrator in a proceeding which excluded Operating Engineers 701 and which took place after Operating Engineers 701 had filed its charge with the Board.

2. The Board was arbitrary and capricious in this case (and in all jurisdictional dispute cases that it has decided in the past 13 years) by refusing to define the weight that it gives to various factors in reaching its determination on the facts.

Operating Engineers 701 now petition for certiorari.

REASONS FOR GRANTING THE WRIT

In 1961, this Court in NLRB v. Radio and Television Broadcast Engineers Union Local 1212 (CBS), 364 US 573 (1960) in-

structed the Board to decide jurisdictional disputes on the facts. From 1961 until 1974, cases that the Board decided on the facts were universally upheld in every Circuit which reviewed them. The only jurisdictional dispute that went to this Court during the period was NLRB v. Plasterers' Union Local No. 79,(Plasterers'), 404 US 135 (1971), in which it was decided that an arbitration between two competing unions did not bind the employer in a § 10(k) case since he was not a party to the arbitration.

The Ninth Circuit now invites this Court to review the basis of Board decision making in § 10(k) cases. It does this by overruling 13 years of Board and court precedents which allow the Board to make its own findings of fact as required by CBS, thereby usurping the function of the Board. The Ninth Circuit also seeks to

impose a weighted standard on the Board and revise the scope of judicial review provided by Congress. The Ninth Circuit further invites review by requiring the Board to give controlling weight to an arbitrator's decision grounded in false testimony and from which one party, Operating Engineers 701, was excluded, all contrary to the Plasterers' case.

1. THE NINTH CIRCUIT'S DECISION REQUIRING THE BOARD TO SET WEIGHTED STANDARDS FOR DECISION IN § 10(k) CASES IS IN DIRECT CONFLICT WITH THE CBS CASE WHICH REQUIRES THAT THE BOARD DECIDE § 10(k) CASES BASED ON ITS EXPERIENCE AND COMMON SENSE.

The Ninth Circuit requires the Board to set weighted standards for the various factors that it uses to decide § 10(k) cases. (See p. 17a, infra) This position of the Ninth Circuit is essentially the position taken by the Board before CBS was decided in 1961. In CBS it was decided that the NLRB must take affirmative action

on § 10(k) cases and award work involved to one of the disputing parties in order to settle work disputes. In rejecting the contention that the Board had no standards to apply to the decision of § 10(k) cases, this Court stated:

> "It is true that this forces the Board to exercise under § 10 (k) powers which are broad and lacking in rigid standards to govern their application. But administrative agencies are frequently given rather loosely defined powers to cope with problems as difficult as those posed by jurisdictional disputes and strikes. It might have been better, as some persuasively argued in Congress, to intrust this matter to arbitrators. But Congress, after discussion and consideration, decided to intrust this decision to the Board. It has had long experience in hearing and disposing of similar labor problems. With this experience and a knowledge of the standards generally used by arbitrators, unions, employers, joint boards and others in wrestling with this problem, we are confident that the Board need not disclaim the power given it for lack of standards. Experience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board." CBS, supra, 364 US at 583.

The Court specifically rejected the Board's contention that it had only the narrow duty to examine strictly legal considerations growing out of prior Board orders, certifications, or collective bargaining agreements in order to decide a § 10(k) dispute, and ordered a broader scope of review stating that the Board should base its decision on

> ". . . factors deemed important in arbitration proceedings, such as the nature of the work, the practices and customs of this and other companies and of these and other unions, and upon other factors deemed relevant by the Board in the light of its experience in the field of labor relations." CBS, supra, 364 US at 578.

The Board in this case did exactly what this Court instructed it to do in CBS. It held 17 days of hearings and then unanimously by decision and determination of dispute awarded the floating crane work to Operating Engineers 701. The decision of the Board was not surprising. Long-

shoremen 50 may be the first union in the history of jurisdictional disputes in this country to claim work for which not a single member of the local union has ever had any experience. No member of Longshoremen 50 testified at the hearing before the Board. The Board's decision weighed the various factors and emphasized those it felt to be compelling in this case. Any finding of fact requires a fair understanding of the record, and in this case there were numerous pages of testimony and multiple exhibits upon which the Board based its decision.

The Board, just like a jury, is supposed to rely, as this Court has instructed in CBS upon "experience and common sense." A fact finder is not supposed to be relying on findings of fact in previous cases. The facts in previous cases are inadmissible before juries. a good arbitra-

tor decides, based on the facts that have been put in evidence before him, and not by review of the opinions of other arbitrators dealing with other facts. Administrative agencies were created by Congress to develop expertise in fact finding, and stare decisis plays a much more limited role in the administrative process than it does in the judicial process. NLRB v. Wyman Gordon Company, 394 US 759, 766 (1969).

The Board in this case stressed history, acquiesence, the contract claim to the work of Operating Engineers 701, skill, experience, efficiency of operation, economy and safety as the basis for its award. How would we measure the eight factors discussed by the Board in its decision?

The Ninth Circuit wants the Board to establish weighted standards for its fact finding. This is not what this

Court instructed the Board to do in CBS. If the Board were now to go into a rule making procedure and decide that a 50% weight should be given to one factor and a 25% weight given to another factor, this would have to be an administrative procedure act hearing in which all employers and employees in the country might want to appear and present their viewpoint. See 5 USC § 553. The problem, as every fact finder knows, is that the weight to be given to any one factor depends on its relation to other factors in the specific situation. Neither the Ninth Circuit nor anyone else can reduce this to a precise measurement for all cases. If for example, in our case at Astoria, Oregon, the members of Longshoremen 50 had even a little experience operating floating cranes the Board might have given another factor equal importance. But since no members of

Longshoremen 50 had ever in his life operated a floating crane, and the work required lifting 40 tons of logs over men's heads, who is to quantify the weight that the Board should give in this case to human safety?

The Ninth Circuit compounds the error by instructing the Board that it should give controlling weight to factors of contract and employer preference. This too reveals the error of the Ninth Circuit's thinking since these were the factors that were dominant before the CBS case.

If employer preference is given controlling weight, the employer could enter into a new contract with lower paid employees, rather than the union that represented the existing higher paid employees. Then if the old union stopped work in protest, the employer could argue his preference was for the new lower paid

workers and win the § 10(k) dispute. The Ninth Circuit decision asking that controlling weight be given to employer preference is an invitation to sweetheart contracts and union busting. See Note, Jurisdictional Disputes Since CBS, The CBS Decision, 39 N.Y.U. L.Rev. 657, 684 (1964). This, of course, is in marked contrast to the present practice which holds that if an employer wishes to assert his right to relief against a union's picketing he must justify his assignment of work in a § 10(k) hearing. NLRB v. Plasterers' Local Union No. 79, 404 US 116, 124 (1971).

Providing a weight for each factor in the decision making process in § 10(k) cases is a legislative function which Congress has not seen fit to exercise. This was pointed out by this Court in CBS. Such a requirement cannot be imposed by the United States Court of Appeals for

the Ninth Circuit.

2. THE NINTH CIRCUIT IS IN DIRECT CONFLICT WITH ALL OTHER CIRCUITS WHICH HAVE REVIEWED § 10(k) DECISIONS AND IGNORES THIRTEEN YEARS OF OPINIONS WHICH HAVE FOLLOWED CBS.

In the first § 10(k) NLRB case subsequent to CBS, International Association of Machinists, Lodge 1743 (J. A. Jones Construction Co.) 135 NLRB 1402 (1962), the Board set out the procedures which it intended to use in these cases in the following language:

> "At this beginning stage in making jurisdictional awards as required by the Court, the Board cannot and will not formulate general rules for making them. Each case will have to be decided on its own facts. The Board will consider all relevant factors in determining who is entitled to the work in dispute, e.g., the skills and work involved, certifications by the Board, company and industry practice, agreements between unions and between employers and unions, awards of arbitrators, joint boards, and the AFL-CIO in the same or related cases, the assignment made by the

> employer, and the efficient operation of the employer's business. This list of factors is not meant to be exclusive, but is by way of illustration. The Board cannot at this time establish the weight to be given the various factors. Every decision will have to be an act of judgment based on common sense and experience rather than on precedent. It may be that later, with more experience in concrete cases, a measure of weight can be accorded the earlier decision." Jones, supra, 135 NLRB at 1410.

CBS and the Jones decision set the ground work for Board decisions for the past 12 years. The standards set by these cases and the Board's technique of considering all factors in rendering § 10(k) decisions have been uniformly approved over the years by each of the Circuits that have considered the question. NLRB v. International Longshoremen's & Warehousemen's Union, 378 F2d 33 (9th Cir 1967); NLRB v. International Longshoremen's & Warehousemen's Union, 413 F2d 30 (9th Cir 1969); Local 134, International Brother-

hood of Electrical Workers v. NLRB, 486 F2d 836 (7th Cir 1973); NLRB v. International Die Sinkers' Conference, Milwaukee Lodge, 402 F2d 407 (7th Cir 1968); NLRB v. Local 25, International Brotherhood of Electrical Workers, 396 F2d 591 (2nd Cir 1968); NLRB v. St.Louis Printing Pressmen & Assistants Union No. 6, 385 F2d 956 (8th Cir 1967); New Orleans Typographical Union No. 17 v. NLRB, 368 F2d 755 (5th Cir 1966); NLRB v. Denver Photographers Union No. 18, 351 F2d 67 (10th Cir 1965); NLRB v. International Brotherhood of Electrical Workers, 339 F2d 145 (2nd Cir 1964); NLRB v. Local 991, International Longshoremen's Association, 332 F2d 66 (5th Cir 1964); NLRB v. Local 825, International Union of Operating Engineers, 326 F2d 213 (3rd Cir 1964). The Ninth Circuit has clearly ignored the mandate of CBS and the clear

line of cases which have followed CBS up to the present time.

3. THE DECISION OF THE NINTH CIRCUIT WILL ALTER THE SCOPE OF JUDICIAL REVIEW OF § 10(k) DECISIONS BY SUBSTITUTING A "CLEARLY ERRONEOUS" STANDARD FOR THE "SUBSTANTIAL EVIDENCE" STANDARD MANDATED BY CONGRESS, THEREBY USURPING THE FUNCTION OF THE BOARD.

Section 10(e) of the Act, 29 USC § 160(e) provides:

> "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

The substantial evidence standard is generally defined as what a reasonable mind might accept as adequate to support a conclusion. Consolidated Edison Company v. NLRB, 305 US 197, 229 (1938); Richardson v. Perales, 402 US 389, 401 (1971). In NLRB v. Nevada Consolidated Copper Corporation, 316 US 105 (1942), this Court held that under the substantial

evidence rule the possibility of drawing inconsistent inferences from a body of evidence does not prevent the drawing of one of these inferences, and if the Board does so, the Court cannot set this inference aside. See also, Consolo v. Federal Maritime Commission, 383 US 607, 620 (1966). In addition, it has been held that the decisions of the NLRB will not be enforced if upon considering the entire record, they appear to be arbitrary and capricious. Packard Motor Car Company v. NLRB, 330 US 485 (1947). This arbitrary and capricious standard has been applied by courts in reviewing § 10(k) decisions. NLRB v. St. Louis Printing Pressman & Assistants Union No. 6, supra, at 960. The necessity for this loose standard of review in protecting the broad discretion given to the Board has been articulated by the Courts of Appeal in various ways.

In NLRB v. International Longshoremen's & Warehousemen's Union, supra, the court stated:

> "We must accept the Board's determination that employees represented by the Aluminum Workers union were, under the undisputed facts, entitled to this work assignment unless such determination is arbitrary and capricious. Our function is limited in this manner because, as in the case of all jurisdictional disputes, the Board was called upon to apply its experience and special expertise in considering all relevant factors, unfettered by rigid standards." 413 F2d at p. 33.

The case of NLRB v. St. Louis Printing Pressman & Assistants Union No. 6, supra, stated:

> "It is settled, however, that the Board's area of discretion in disposing of § 10(k) controversies is wide and indeed, 'involves of necessity a large measure of informed discretion.'"
>
> * * * * * * * * *
>
> "It has been noted, too, that there are no rigid standards of decision in § 10(k) matters and that the Board is thus free to resolve these matters on a case-by-case basis where experience

> and common sense are important factors." 385 F2d at p. 960

In New Orleans Typographical Union No. 17 v. NLRB, supra, the court stated:

> "Congress, in § 10(k), did not prescribe standards which the Board is required to follow in determining these disputes. No court, so far as we know, has proposed to legislate in this field. Neither the Board or this Court can promulgate a rule such as here suggested." 368 F2d at p. 764.

The Fifth Circuit clearly understood that if weighted standards were involved, the court would be moving toward a different scope of review than that set out in 29 USC § 160(e). The Court stated:

> "It is quite evident that if we were here dealing with rigid standards of determination and if this were a judicial proceeding controlled by such factors as the preponderance of the evidence, the ultimate decision might very easily have gone the other way. Remembering that Congress prescribed no § 10(k) standards, and that the Order must be reviewed on the record as a whole, can we confidently say that there

> was no substantial evidence to support what the Board did?" 368 F2d at p. 765.

The Board decision in this case is based on substantial evidence in the record considered as a whole that floating cranes were excluded from longshore work. The Longshore contract provides:

> "1.12 The term 'longshore crane' does not include any classes of tools or equipment not presently in use on the waterfront. The term 'longshore crane' shall not include cranes or other hoisting equipment mounted on any ship, floating-crane barge, or other vessel. The foregoing provisions may be modified, on motion of either party, by action of the Joint Coast Labor Relations Committee determining that any tools or equipment described in 1.12 shall be 'longshore cranes' subject hereto." (PMA Ex 114, sec 1.12, p. 137)

The Ninth Circuit attempts to evade the substantial evidence rule by saying that its belief that the Board misinterpreted the Longshoremen's Contract is a conclusion of law rather than a finding of

fact. The determination of the Board that the floating crane was not a longshore tool was based on contract language, the evidence of three Joint Committee meetings between the Longshoremen and the Pacific Maritime Association and substantial testimony about those three meetings.

The Board also finds that Operating Engineers 701 have a contract claim to the work because stevedore companies and the crane owning companies were co-employers of the Operating Engineers 701. There is a clause in the agreement between Brady-Hamilton Stevedore Company and Willamette Western, the crane owner, which states that the Operating Engineers:

> "shall be deemed for all purposes the employees of the charterer."

There is substantial evidence in the record dealing with the effect of this language in the Operating Engineers 701

contract and the extent to which the foreman of the charterer, the stevedore company, in fact exercises supervision over the Operating Engineers 701. There were hundreds of pages of disputed testimony and exhibits which were resolved by the Board in its finding of fact that the Operating Engineers 701 had a better contract claim to the work. All of this evidence is ignored by the Ninth Circuit in its assertion that this was a conclusion of law. Not only was this finding not a conclusion of law but it shows the danger in the Court of Appeals attempting to usurp the fact finding function of the Board.

It may be that the Ninth Circuit, after examining the entire record, was left with the definite and firm conviction that a mistake had been committed by the Board in its fact finding on the contract language

and the joint committee negotiating history that followed. If a clearly erroneous standard was permissible in NLRB cases, then the Ninth Circuit could have reversed. United States v. United States Gypsum Company, 333 US 364, 395 (1948). But where the substantial evidence standard is mandated by Congress in § 10(k) cases the Ninth Circuit decision is not only in error but places all Board fact finding in future § 10(k) cases in jeopardy.

4. BY REVERSING THE BOARD AND HOLDING THAT THE ARBITRATION BETWEEN PACIFIC MARITIME ASSOCIATION AND THE LONGSHOREMEN WAS DETERMINATIVE IN AWARDING THE WORK TO THE LONGSHOREMEN, THE NINTH CIRCUIT IGNORED THE HOLDING IN PLASTERERS' REQUIRING THAT ONLY ARBITRATIONS IN WHICH ALL INTERESTED PARTIES HAVE PARTICIPATED BE GIVEN EFFECT.

The Board has followed the rule that arbitrations will be ignored unless all parties to the dispute are parties to the

arbitration. Lithographers and Photoengravers (Beacon Journal Publishing Co.), 185 NLRB 464 (1970); International Longshoremen's & Warehousemen's Union (Matson Navigation Co.) 140 NLRB 449 (1963). This rule is based in the concept of fundamental due process that every party is entitled to a hearing before an impartial tribunal. If a party, such as Operating Engineers 701, is excluded from an arbitration, the true facts are not likely to be developed.

The reason for the rule has never been clearer than in this case. As of April 3, 1969, the day of the work stoppage by Longshoremen 50, everyone was in agreement that the Longshoremen's contract excluded floating cranes. The Longshoremen's contract so provided and Pacific Maritime Association had resisted any changes in the language or effect of the contract

provision. Then, after the fact, Longshoremen 50 and Pacific Maritime Association decided they wanted to rewrite history nunc pro tunc. After Operating Engineers 701 had filed the charge based on the Labor Management Relations Act, Longshoremen 50 and Pacific Maritime Association went through a curious farce. They invoked arbitration under their contract and in the hearing before the arbitrator, they both argued that the floating crane work in Astoria should be done by Longshoremen 50. The contract provided that this could only be done if there were skilled longshoremen available to do the work. Accordingly, a sworn affidavit was submitted to the arbitrator that there were available in the Port of Astoria members of Longshoremen 50 who had experience operating floating cranes. This was false. On April 3, 1969, a member of the

Longshoremen's Labor Relations Committee told Pacific Maritime Association that not one member of Longshoremen 50 had any experience operating a floating crane. This fact was overwhelmingly demonstrated in the 17 day trial before the Hearing Officer of the Board. The arbitrator then recited this false fact as the basis for his arbitrator's award.

If Operating Engineers 701 had been a party to that after-the-fact arbitration as they were a party in the Board proceeding, the falsehood could never have become the basis for the arbitrator's decision.

This Court understands the significance of not requiring a party to be bound by a decision in which he does not participate. In the Plasterers' case, in a § 10(k) setting, two competing unions took their dispute to the AFL-CIO Joint Board which awarded the work to one of them in an arbitration

proceeding based on a 1917 inter-union agreement. The employer was not a participant in that arbitration proceeding and the Court made this the basis of its decision in refusing to give any effect to such an arbitration award. The Ninth Circuit in taking the narrow view and requiring the Board to give controlling weight on the interpretation of a contract to the factual evidence developed in an ex parte hearing before the arbitrator, when the Board knows that the evidence is false, is directly contrary to the Court ruling in Plasterers'. It would require the Board to follow a procedure which is contrary to every sense of due process.

CONCLUSION

When the Ninth Circuit says that it believes the scope of review in § 10(k) cases is a "paper tiger," it is seeking a larger role for the judiciary in determining

work disputes. But any decision by a single Circuit that disagrees with the decisions of this Court and all other Circuit Courts as well as rejecting the standard of review specified in the Act has a catastrophic effect on labor management relations.

The Ninth Circuit stresses that "since CBS the Supreme Court has not had occasion to review the Board's § 10(k) decision-making process, though it has reiterated that it is the Board's duty to make affirmative work awards." (See p. 17a, infra) The opinion of the Ninth Circuit is almost a petition to this Court to take a new look at the CBS case and the way it has been implemented. The writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner,* vs. INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL NO. 50, *Respondent,* and INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 701, *Intervenor.*	No. 72-1908
INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL NO. 50, *Petitioner,* vs. NATIONAL LABOR RELATIONS BOARD, *Respondent,* and PACIFIC MARITIME ASSOCIATION, *Intervenor.*	No. 72-2263
PACIFIC MARITIME ASSOCIATION, BRADY-HAMILTON STEVEDORE CO.; and W. J. JONES & SON, INC., *Petitioners,* vs. NATIONAL LABOR RELATIONS BOARD, *Respondent,* and INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 701, *Intervenor.*	No. 72-2315

[August 29, 1974]

On Application for Enforcement and On Petitions for Review of an Order of the National Labor Relations Board

Before: MERRILL and DUNIWAY, Circuit Judges, and TAYLOR,* District Judge.

OPINION

DUNIWAY, Circuit Judge:

The National Labor Relations Board petitions, in No. 72-1908, under 29 U.S.C. §160(e), for enforcement of its cease and desist order against Local 50 of the International Longshoremen's and Warehousemen's Union. In Nos. 72-2263 and 72-2315, Local 50 and the Pacific Maritime Association (PMA), an association representing the employers, petition to set the Board's order aside. We deny enforcement in No. 72-1908 and grant the petitions in Nos. 72-2263 and 72-2315.

This is the fourth time that litigation stemming from this particular jurisdictional dispute between Local 50 (the Longshoremen) and Local 701 of the International Union of Operating Engineers (the Engineers) has reached this court. Two of our previous decisions have been published and in them we extensively reviewed both the underlying facts of the dispute and the administrative proceedings that led to judicial review. See *Henderson v. International Longshoremen's and Warehousemen's Union, Local 50,* 9 Cir., 1972, 457 F.2d 572; *Henderson v. International Union of Operating Engineers, Local 701,* 9 Cir., 1969, 420 F.2d 802. The Board's decisions in this case are reported at 193 N.L.R.B. 266 (1971) and 181 N.L.R.B. 315 (1970). Rather than once again burdening the books with a full recitation of the legal history of this dispute, we will state the facts only in the barest outline necessary for the present decision.

On April 3, 1969, in Astoria, Oregon, raftmen represented by the Longshoremen refused to hook up logs to barge-mounted floating whirly cranes which were loading logs onto ships and were operated by employees represented by the Engineers. This work stoppage resulted in the firing of the engineer crane operators by Brady-Hamilton Co. and W. J. Jones & Son, Inc., the stevedoring companies which had leased the barges and cranes, with their crews, from their owners. Longshoremen then began

*The Honorable Fred M. Taylor, Senior United States District Judge for the District of Idaho, sitting by designation.

operating the cranes and they have done so ever since. In the work assignment dispute that has culminated in this litigation, both the Longshoremen and the Engineers claim the right to be assigned to operate the barge-mounted floating whirly cranes loading logs on ships in Astoria.

Shortly after the work stoppage, the Engineers filed unfair labor practice charges against the Longshoremen with the Board. The Engineers also began picketing the Brady-Hamilton and Jones jobsites. PMA, representing the employers, then filed unfair labor practice charges against the Engineers. The Board's Regional Director obtained an injunction under §10(l), 29 U.S.C. §160(l) of the National Labor Relations Act (NLRA). See *Henderson v. International Union of Operating Engineers, Local 701, supra.* After a short investigation, the Board concluded that there was reasonable cause to believe that both the Longshoremen and the Engineers had violated §8(b)(4)(D) of the NLRA (29 U.S.C. §158(b)(4)(D)), which forbids coercive union activity designed to force any employer to assign work to one union instead of another. As a result of this preliminary finding, the Board held hearings under §10(k) (29 U.S.C. §160 (k)) to determine which set of employees was entitled to the work in dispute. At the conclusion of these hearings, the Board held that the employees represented by the Engineers were entitled to the work, 181 N.L.R.B. 315, 317.

The Longshoremen failed to notify the Board within the ten days fixed by the statute that it would comply with the Board's determination, and therefore the Board issued an unfair labor practice complaint against the Longshoremen. Hearings were held, and the Trial Examiner found that the Longshoremen had violated §8(b)(4)(i)(ii)(D) of the NLRA and the Board adopted his findings, conclusions and recommendations and issued a cease and desist order against Local 50, 193 N.L.R.B. 266. This is the order that the Board now seeks to have enforced and that the Longshoremen and PMA seek to have set aside.

In an enforcement proceeding such as this, based upon the Board's determination that a union has violated §8(b)(4)(D), there is usually no question that the union has committed unfair labor practices within the plain meaning of the statute, assuming that the Board's §10(k) decision is valid. As the Supreme Court

has noted, §8(b)(4)(D) is inextricably tied to §10(k). *NLRB v. Plasterers' Union*, 1971, 404 U.S. 116, 123; *NLRB v. Radio and Television Engineers, Local 1212*, 1961, 364 U.S. 573, 576 (hereinafter referred to as the *CBS* case). Because the Board's §8(b)(4)(D) complaint is predicated upon its resolution of the work assignment dispute in the §10(k) hearing, the crucial question, in this case, is whether the Board's §10(k) award is sustainable. *NLRB v. International Longshoremen's and Warehousemen's Union*, 9 Cir., 1967, 378 F.2d 33, 34. The only significant issues raised by the briefs submitted in this case concern the validity of the Board's §10(k) award.[1] If we determine that the Board's assignment of the disputed work to the Engineers is sustainable then the Board's cease and desist order must be enforced. Conversely, if we determine that the §10(k) work award is not sustainable then enforcement should be denied.

THE BOARD'S WORK AWARD

Since it has begun making affirmative work awards under §10(k) in jurisdictional disputes, the Board has formulated its decisions in the same manner in the overwhelming majority of its cases. These decisions generally segregate the factors evaluated, discuss them in separate paragraphs, and make individual determinations about which union a particular factor favors. In its conclusions the Board usually cites the most influential of these factors. However, the Board almost always disclaims reliance

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[1]In its brief, PMA urges us to hold that §10(k) decisions are directly reviewable. Twice before we have rejected this suggestion on the ground that no final order results from a §10(k) hearing. *Henderson v. International Longshoremen's and Warehousemen's Union, Local 50, supra*, 457 F.2d at 577-78; *NLRB v. International Longshoremen's and Warehousemen's Union, supra*, 378, F.2d at 35-36. The decisions of this court in *Waterway Terminals Co. v. NLRB*, 9 Cir., 1972, 467 F.2d 1011, and of the Supreme Court in *NLRB v. Plasterers' Union, supra*, only serve to reinforce our holding that §10(k) decisions are not directly reviewable.

PMA and the Longshoremen also challenge the Board's order on the grounds that the Board failed to conform to the procedural requirements of the statute. These claims by their terms involve a challenge to the Board's procedures in all §10(k) hearings. We need not entertain such a sweeping challenge to the Board's procedures because we grant the relief sought by the PMA and the Longshoremen on other grounds.

upon any particular factor by asserting that the decision was made "[u]pon the entire record, and after full consideration of all relevant factors. . . ." *Local 2, IUOE (PVO Int'l, Inc.)* 209 N.L.R.B. #109 at 10 (1974).

Unfortunately, the Board's decisionmaking process was, if anything, more obtuse than usual in the §10(k) case under review. In its opinion the Board moved almost aimlessly from factor to factor without making explicit how much weight a particular factor was given or in some instances even which union the factor favored. Despite this unsatisfactory method of analysis, the Board did mention nine of the factors that it frequently evaluates in jurisdictional dispute decisions.

The Board noted that Engineers had operated the floating cranes loading logs on ships at Astoria from the time of their introduction there in 1964 until the work stoppage in 1969, and that the Longshoremen had "long acquiesced" in this assignment. Thus the factors of past practice and acquiescence were presumably found to favor the Engineers.

The Board was more explicit in holding that the factors of skill, economy and safety favored the Engineers. The Board found that the work in question was very difficult and that the Longshoremen were, without exception, inexperienced at this work while the Engineers were highly skilled floating crane operators. The Board also found that after the Engineers were fired and replaced by Longshoremen, the safety record of the crane operation deteriorated while the expense of it increased. Outside repairmen had to be hired after the Engineers were fired because the Longshoremen, unlike the Engineers, were unable to service the cranes.

Additionally, the Board held that the Longshoremen's Board certification did not cover the disputed work because the certification was issued before the introduction of this type of crane. In considering the PMA-Longshoremen collective bargaining contract, to which the employers, Brady and Jones, were bound, the Board concluded that the agreement specifically excluded the disputed work from its provisions. The Board also distinguished prior Board §10(k) decisions which had accorded this PMA-Longshoremen contract significant weight. Finally, while the Board failed

to discuss employer preference, it did mention the fact that the employers' original work assignment was to the Engineers.

In sum, the Board's §10(k) decision appears to rest upon the finding that the Engineers were more skilled, efficient, and safe employees whose work assignment the factors of past practice and acquiescence also favored. In finding in favor of the Engineers, the Board rejected the Longshoremen's claims that the factors of Board certifications, industry practice, collective bargaining agreements, employer preference, and Board precedent favored them.

JUDICIAL REVIEW OF §10(k) WORK AWARDS

There are two components of judicial review of §10(k) work assignments. First, in reviewing the Board's findings of fact, we are statutorily bound to apply the substantial evidence test. 29 U.S.C. §160(e). Therefore, "findings of the Board with respect to questions of fact, shall be conclusive, if supported by substantial evidence on the record considered as a whole." *NLRB v. International Longshoremen's and Warehousemen's Union, supra,* 378 F.2d at 35; *Waterway Terminals Co. v. NLRB, supra,* 467 F.2d at 1018. Second, we examine the Board's legal conclusions in light of its fact findings. At this stage of judicial review, we apply the arbitrary and capricious standard: "[w]e must accept the Board's determination . . . unless such determination is arbitrary and capricious." *NLRB v. International Longshoremen's and Warehousemen's Union,* 9 Cir., 1969, 413 F.2d 30, 33. In turn we will apply these tests to the challenged work award.

Substantial Evidence Test

There is an abundance of evidence in the record to support the Board's findings that at the time of the work stoppage the Engineers were more skilled, efficient and safe crane operators than were the Longshoremen. The findings as to past practice and acquiescence, which buttress these conclusions, are also supported by substantial evidence.

The Board's finding and conclusion that the Longshoremen's certification does not support a work award to them in this instance is also supported by the evidence. The 1938 Longshoremen certification, which is coastwide, covers only "longshore work." *Shipowners Ass. of Pacific Coast,* 7 N.L.R.B. 1002, 1041 (1938).

Nothing in that certification specifically places the operation of barge-mounted floating whirly cranes loading ships within the Longshoremen's occupational jurisdiction. To assert that this work is by definition contained within the rubric "longshore work" would be to assume the answer to the central question at issue. The Board rejected such circular reasoning.

The main thrust of the PMA-Longshoremen argument for the denial of enforcement is that the Board misconstrued the PMA-Longshoremen collective bargaining contract. We agree.

In 1959, PMA and the Longshoremen entered into a coastwide mechanization agreement in an attempt to reconcile the need for the introduction of labor-saving machinery with the interests of the Longshoremen in job security. The PMA-Longshoremen briefs concede, as they must, that this agreement, as originally executed, explicitly excludes the operation of barge-mounted floating whirly cranes from the agreement's terms. The Board relied upon this clause to hold that the contract did not apply to the work in question.

PMA and the Longshoremen argue, however, that the agreement must be read in light of the interpretation given to it by the parties to it. They point out that shortly after the work stoppage, the parties entered into arbitration pursuant to a clause in the agreement to determine whether or not the agreement covered the disputed work. At the conclusion of the arbitration, on May 8, 1969, the Coast Arbitrator held that: "The position of the ILWU that the Agreement has assigned the work of operating floating cranes in Astoria to Longshoremen is sustained." This decision, we think, falls within the terms of the agreement, which contemplates the extension of the agreement to new types of equipment that may be introduced by the employers.

In its §10(k) opinion, the Board completely ignored the results of this arbitration. This position was consistent with the Board's policy that it will not be bound by arbitration that does not include all of the parties to a jurisdictional dispute. See, e.g., *Lithographers & Photoengravers Int'l (Beacon Journal Publishing Co.)* 185 N.L.R.B. 464 (1970). See also Johns, Jurisdictional Disputes Under the NLRA, *Labor Law Developments 1967* at 46 (1967). This Board policy may be prudent in most instances.

However, it was not appropriately applied to the arbitration in this case.

In many cases a jurisdictional dispute will arise between two unions, each of which has a contract with the same employer. This is the type of case that was before the Court in *CBS, supra.* In such a case the Board can hardly be bound to give effect to an award under one of the contracts which gives the disputed work to one of the unions when the other was not a party to the arbitration.

This case is different. The employers, Brady and Jones, never were parties to a collective bargaining contract with the Engineers. For some years they had leased the barges and cranes from owners who did have a contract with the Engineers. The leased barge-cranes had previously been used for different work in the heavy construction industry, not for loading logs on ships. The lessors provided the operators, who became loaned employees of Brady and Jones. This, however, did not give rise to a collective bargaining agreement between the Engineers and Brady and Jones.

Moreover, immediately after the dispute arose, Brady and Jones found that the owners would lease the barges and cranes to them "bare-boat," i.e., without any crew. At that point the connection between Brady and Jones and the Engineers ceased. No one has claimed that there was any breach of contract between Brady and Jones and the Engineers when this was done. To hold that there was would be to lock the employers into a contract to which they were not parties merely because, when they first started to use the equipment, they leased it with crew. They would never be able to use the same equipment, whether leased or purchased, with their own employees as operators, unless they dealt with the same union as the one with which the former lessors had a contract. See *I.L.W.U. (American Mail Line)*, 144 N.L.R.B. 1432, 1441 (1963).

Brady and Jones were parties to the coastwide PMA-Longshoremen agreement. The Longshoremen claimed that, under that agreement, they were entitled to the work. That is what the arbitration was about.

The fact that the Engineers were not a party to the arbitration does not undermine the validity of the award. The purpose

of the arbitration was to decide upon the meaning of the agreement, and therefore the only logical or necessary parties to the arbitration were the parties bound by it, the Longshoremen and the PMA, acting for Brady and Jones. The arbitration resulted in an interpretation of the contract that bound the parties to the contract. There was no legitimate ground for the Board's refusal to accept the parties' own interpretation of their contract.

We are not bound to accept the Board's construction of a contract when it is not supported by substantial evidence or when it is not legally correct. *NLRB v. Southern Calif. Dist. Council of Laborers*, 9 Cir., 1971, 443 F.2d 220. We conclude that the PMA-Longshoremen contract did assign the disputed work to the Longshoremen and that the Board's finding of fact to the contrary is incorrect.

This conclusion has a bearing upon the Board's other findings of fact. In its opinion the Board failed to give weight to the factor of employer preference, yet the employers' representative, PMA, has vigorously urged the vindication of the Longshoremen's claim. Furthermore, since the inception of the work stoppage, Brady-Hamilton and Jones have at all times assigned the crane operation to the Longshoremen, which supports PMA's contention that the employers prefer that the Longshoremen be awarded the work.

In response to this contention the Engineers point out that before the work stoppage the employers had always assigned the work to the Engineers. However, as we have noted, this work assignment was made pursuant to the employers' lease agreement with the owners of the cranes. It was made by the then owners of the cranes, not by Brady and Jones, the employers here involved. Ever since the employers have had the contractual freedom to make their own crane operation work assignment, they have given this work to the Longshoremen.

The foregoing discussion points out two significant facts. First, this work dispute does not involve an employer caught in a cross fire between two unions with which the employer has contracts. Rather, only one union has a contractual claim to this work.[2]

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[2]In an ambiguous passage, the Board's decision quotes the barge crane owners' labor agreement with the Engineers without drawing any conclusion about its effect. To the extent that the Board relied upon this

Second, the employers, once free from the lease agreement which permitted the barge owners to designate Engineers to do the work, have behaved continually in a manner consistent with the conclusion that they prefer the assignment of the work to the Longshoremen.

The Board's misconstruction of the contract may also have led to a misplaced emphasis on the factors of skill, efficiency and safety. The purpose of the PMA-Longshoremen mechanization agreement was to allow the employers to introduce new machinery while preserving the Longshoremen's right to fill all available jobs. Therefore, one of the employers' express obligations under the agreement was to train the Longshoremen to safely and efficiently perform all work covered by the contract. In its §10(k) opinion the Board noted that such training commenced after the work stoppage. If the Board had correctly determined that the contract covered the disputed work it might have given weight to the fact that the skill problem was anticipated by the agreement.

Perhaps more significantly, by determining that the PMA-Longshoremen contract did not bear upon the work dispute, the Board ignored the efforts of labor and management to provide for a peaceful and stable method of resolving labor crises caused by technological advancement. In its past decisions, the Board has been more responsive to these efforts. It has treated the very PMA-Longshoremen contract before us as persuasive evidence that the factor of industry practice favored a work assignment to the Longshoremen. In fact, the Board has praised this contract and has consistently shown deference to it. In *United Industrial Workers of North America (Albin Stevedore Co.)* 182 N.L.R.B. 633, 636 (1970), after determining that the collective bargaining contracts and Board certification were not controlling the Board stated:

> "The trend in the maritime industry for the past decade has steadily been toward the replacement of manual labor by mechanized equipment. This reality was recognized early by

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contract to hold that either the factors of collective bargaining contracts or employer preference favored the Engineers, the Board's reliance was misplaced. That agreement did not bind either Brady or Jones or the Longshoremen, and therefore has no bearing upon this jurisdictional dispute.

> parties concerned with shipping on the West Coast of the United States and it culminated in 1961 with the West Coast Longshore Agreement executed by the Pacific Maritime Association . . . and various craft unions. The primary aim of that agreement was to lighten the impact of unemployment upon longshoremen due to mechanization and thereby promote industrial peace in this area of American industry. The Board has recognized the soundness of this objective and indeed relied upon its as a factor favoring longshoremen in the hammerhead crane case even though that dispute also involved the Seafarers, which is not a signatory to the agreement, and the Alaskan port, which is not covered by the agreement.
>
> We see no reason to deviate from implementation of the above policy in this case, . . . we find that industry practice favors the longshoremen."

See also *United Industrial Workers of North America, (Sea Land Service Co.)* 188 N.L.R.B. 241 (1971); *United Industrial Workers (Albin Stevedore)* 162 N.L.R.B. 1005 (1967); *ILWU (Howard Terminal)* 147 N.L.R.B. 359 (1964); *ILWU (American Mail Line)* 144 N.L.R.B. 1432 (1963); *ILWU (PMA)* 137 N.L.R.B. 119 (1962). But see *ILWU (Matson Terminals)* 140 N.L.R.B. 449 (1963); Atleson, The NLRB and Jurisdictional Disputes: The Aftermath of CBS, 53 Geo. L.J. 93, 133-34 (1964).

The Board did attempt to distinguish the above cited cases. However, the Board's misconstruction of the PMA-Longshoremen contract may have caused the Board to fail to find that industry practice favored the Longshoremen.

In sum, while many of the Board's findings of fact are supported by substantial evidence, the Board's erroneous finding or conclusion about the applicability of the PMA-Longshoremen contract casts doubt upon the validity of the Board §10(k) decision. We must decide whether the Board's fact finding errors undermine its §10(k) decision to the extent that the work assignment must be rejected as arbitrary and capricious.

Arbitrary and Capricious Standard

The Board's authority to resolve jurisdictional disputes derives from the Taft-Hartley Act. However, from 1947 until 1961, the

Board had a firm policy not to compel an employer to assign particular work to employees represented by one union rather than another, unless the employer's assignment was in violation of a Board order, certification or collective bargaining contract. In *CBS, supra,* the Supreme Court put an end to this administrative policy by requiring that the Board make affirmative work awards in all genuine jurisdictional disputes.

One of the Board's reasons for its reluctance to intervene in jurisdictional disputes was that §10(k) set forth no standards to guide it in resolving these disputes. The Court responded that it had faith in the Board's ability to overcome this handicap.

> "It is true that this forces the Board to exercise under §10(k) powers which are broad and lacking in rigid standards to govern their application. But administrative agencies are frequently given rather loosely defined powers to cope with problems as difficult as those posed by jurisdictional disputes and strikes. It might have been better, as some persuasively argued in Congress, to intrust this matter to arbitrators. But Congress, after discussion and consideration, decided to intrust this decision to the Board. It has had long experience in hearing and disposing of similar labor problems. With this experience and a knowledge of the standards generally used by arbitrators, unions, employers, joint boards and others wrestling with this problem, we are confident that the Board need not disclaim the power given it for lack of standards. Experience and common sense will supply the grounds for the performance of this job which Congress has assigned to the Board." *(CBS, supra,* 364 U.S. at 583.)

Almost fourteen months after *CBS,* the Board came down with its first §10(k) decision under its new mandate. *Int'l Ass. of Machinists, Lodge 1743 (J. A. Jones Construction Co.)* 135 N.L.R.B. 1402 (1962). Once again the Board emphasized the difficulty of its task.

> "Section 10(k) of the Act contains no standards to aid the Board in determining jurisdictional disputes. It says only that the Board is to 'hear and determine' the dispute. The legislative history is equally lacking in indication of standards." (*Jones, supra,* 135 N.L.R.B. at 1410-11.)

The Board also stated that it was not going to establish any §10(k) decisionmaking standards until it had gained a sufficient amount of the experience that the Supreme Court had referred to in *CBS*.

> "At this beginning stage in making jurisdictional awards as required by the Court, the Board cannot and will not formulate general rules for making them. Each case will have to be decided on its own facts. The Board will consider all relevant factors in determining who is entitled to the work in dispute, e.g. the skills and work involved, certifications by the Board, company and industry practice, agreements between unions and between employers and unions, awards of arbitrators, joint boards, and the AFL-CIO in the same or related cases, the assignment made by the employer, and the efficient operation of the employer's business. This list of factors is not meant to be exclusive, but is by way of illustration. The Board cannot at this time establish the weight to be given the various factors. Every decision will have to be an act of judgment based on common sense and experience rather than on precedent. *It may be that later, with more experience in concrete cases, a measure of weight can be accorded the earlier decisions.*" (*Jones, supra,* 135 N.L.R.B. at 1410, emphasis added.)

Though the Board has subsequently resolved hundreds of §10(k) disputes, it has never altered its position nor reevaluated its decisionmaking process. In fact, as we observed earlier, the form of these decisions as well as the decisions' reliance upon the "entire record and . . . all relevant factors" rarely deviate from a fixed pattern.

As might be expected, given the uncertainty surrounding the Board's basis for decisionmaking, the Courts of Appeals have been reluctant to deny enforcement to Board orders stemming from §10(k) proceedings. We have been able to find only fourteen reported cases decided since *CBS* and *Jones* in which circuit courts have reviewed the merits of a §10(k) decision.[3] In each

[3] *Local 134, International Brotherhood of Electrical Workers v. NLRB,* 7 Cir., 1973, 486 F.2d 863; *NLRB v. International Longshoremen's and Warehousemen's Union,* 9 Cir., 1969, 413 F.2d 30; *NLRB v. Int'l Die Sinkers' Conference, Milwaukee Lodge,* 7 Cir., 1968, 402 F.2d 407; *NLRB v. Local 25, International Brotherhood of Electrical Workers,*

of these cases, the Board's work award was sustained, as the Courts of Appeals have granted the Board broad leeway in carrying out its *CBS* mandate.

The arbitrary and capricious standard has been applied in a manner that has led us, along with our sister circuits, to defer to the Board's judgment both in the creation of and implementation of §10(k) decisionmaking standards.

> "The broad scope of the Board's functioning in section 10(k) proceedings is outlined in [*CBS*]. Under this section, Congress has committed to the Board a task which requires the exercise of a wide degree of discretion and its special expertise. Among other things, the Board considers skills and work involved, certifications by the Board, company and industry practice, agreements between unions, and between employers and unions, the awards of arbitrators, the assignments made by the employer, and the efficient operation of the employer's business." *(NLRB v. Teamsters, Chauffeurs, Warehouse & H. Loc., U.*, 9 Cir., 1968, 403 F.2d 667, 673.)

The Third Circuit has stated that "it is the function of the Board and not this court to consider the relevant factors and to weigh and evaluate the evidence adduced with respect to each." *NLRB v. Local 825, International Union of Operating Engineers, supra*, 326 F.2d at 218. And the Eighth Circuit has agreed:

> "It is settled, however, that the Board's area of discretion in disposing of §10(k) controversies is wide and, indeed, 'involves of necessity a large measure of informed discretion.'

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2 Cir., 1968, 396 F.2d 591; *NLRB v. St. Louis Printing Pressmen & Assistants Union No. 6, Inc.*, 8 Cir., 1967, 385 F.2d 956; *NLRB v. International Longshoremen's and Warehousemen's Union*, 9 Cir., 1967, 378 F.2d 33; *NLRB v. Local 676, Int'l Bro. of Teamsters, etc.*, 3 Cir., 1967, 376 F.2d 3; *New Orleans Typographical Union No. 17 v. NLRB*, 5 Cir., 1966, 368 F.2d 755; *NLRB v. Local 1291, International Longshoremen's Association*, 3 Cir., 1966, 368 F.2d 107; *NLRB v. Denver Photoengravers' Union No. 18*, 10 Cir., 1965, 351 F.2d 67, *NLRB v. Local 1291, International Longshoremen's Association, AFL-CIO;* 3 Cir., 1965, 345 F.2d 4; *NLRB v. International Brotherhood of Electrical Workers*, 2 Cir., 1964, 339 F.2d 145; *NLRB v. Local 991, International Longshoremen's Association*, 5 Cir., 1964, 332 F.2d 66; *NLRB v. Local 825, International Union of Operating Engineers*, 3 Cir., 1964, 326 F.2d 218.

> [T]he Board is thus free to resolve these matters on a case-by-case basis where experience and common sense are important factors." *NLRB v. St. Louis Pressmen & Assistants Union No. 6, Inc., supra,* 385 F.2d at 960 (per Blackmun).

The Fifth and Seventh Circuits have also agreed: "We agree with the Third and Fifth Circuits that where the Board has made its determination on the totality of factors involved, the award should not be disturbed." *NLRB v. Int'l Die Sinkers Conference Milwaukee Lodge, supra,* 402 F.2d at 411.

In general terms, the Courts of Appeals have also approved the Board's reliance upon such varied criteria as skill, custom, efficiency, economy and past practice. See, e.g., *NLRB v. Local 25, International Brotherhood of Electrical Workers, supra,* 396 F.2d at 594; *NLRB v. Denver Photoengravers' Union No. 18, supra,* 351 F.2d at 70-71. More significantly for the present controversy, the Third, Fifth and Eighth Circuits have all specifically approved the Board's position that collective bargaining contracts are only one factor among many to be considered in resolving jurisdictional disputes.[4] *NLRB v. St. Louis Pressman & Assistants Union, supra,* 385 F.2d at 961; *New Orleans Typographical Union #17 v. NLRB, supra,* 368 F.2d at 763; *NLRB v. AFL-CIO, supra,* 345 F.2d at 10.

Our study of the Board's numerous §10(k) awards persuades us that in some respects its decisions can be characterized as both arbitrary and capricious. Many commentators have examined the Board's 10(k) decisions and have been dismayed by the Board's failure to articulate any decisionmaking standards.[5] One observer complained that the "criteria have been shuffled and shifted to justify . . . a pre-ordained result."[6] The conclusions of the American

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[4] *See ILWU (Matson Terminals)* 140 N.L.R.B. 449, 455 n.6 (1963); *ILA (Pa. Sugar Div.)* 137 N.L.R.B. 1458, 1465 (1962).

[5] See, e.g., Cohen, the NLRB and Section 10(k): A Study of the Reluctant Dragon, 14 Lab. L.J. 905, 918 (1963); Collister, Standards for Assignment of Work in Jurisdictional Work Disputes, 33 U.M. Kan. City L. Rev. 35, 58 (1965); O'Donoghue, Jurisdictional Disputes in the Construction Industry Since CBS, 52 Geo. L. J. 314, 358 (1963).

[6] Atleson, The NLRB and Jurisdictional Disputes: The Aftermath of CBS, 53 Geo. L. J. 93, 150. One isolated though conspicuous example of this phenomenon was the Board's divergent treatment of the factor of wage scale differences among competing unions in *United Bro'hood*

Bar Association's special §10(k) committee were even more critical:

> "Due to the lack of proper guideposts, the complexity of the problem, the multiple criteria employed and the variance in the weights accorded such criteria, the Board, since the *CBS* decision, has accomplished little other than to inject additional doubt and uncertainty into an already troublesome and difficult area of labor relations." (Supplementary Report of the Special 10(k) Committee 439 (1964).)

Since its *Jones* decision, the Board has consistently maintained that its policy in making §10(k) work awards is to decide each case on its own merits without announcing any standards or principles which govern the decisions that are made. Such a practice has relieved the Board of the burden of reconciling its decisions either with precedent or with any predetermined set of standards. Such a practice makes life easy for the Board's Trial Examiners or Administrative Law Judges, and for the Board itself. To call the practice a policy, however, is a misnomer. It is a little like making a bouillabaisse or pot au feu. Various ingredients go into the pot and are stirred and simmered, and no matter what they are, or what quantity or quality of each is used, the product is always the same—a bouillabaisse or a pot au feu. Nobody can dispute the conclusion; nobody can say, except as a matter of personal taste, whether the result is good or bad.

While the practice may be easy and comfortable for the Board, it makes judicial review virtually impossible, because the decision is totally unprincipled. There is no way for the reviewing court to determine what principles, if any, led to the decision. When the Board lays the stew before the court, its position is essentially this: "We have put in everything relevant, we have stirred the mixture, and this is the result. Whether you like it or not, you must accept it, because we, not you, are the experts. The Supreme Court told you that in *CBS*. Who are you to say that we are not?"

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of Carpenters and Joiners of America, Local 171 (Knowlton Const. Co.) 207 N.L.R.B. No. 57 (1973) and in *Sheet Metal Workers Int'l Ass., Local 553 (Ray Proof Corp.)* 198 N.L.R.B. No. 36 (1972).

We do not think that the Congress or the Supreme Court intended that judicial review should be such a paper tiger. Since *CBS* the Supreme Court has not had occasion to review the Board's §10(k) decisionmaking process, though it has reiterated that it is the Board's duty to make affirmative work awards. *NLRB v. Plasterers' Union, supra, 404 U.S.* at *131*. Most of the circuit court decisions cited above involved the review of §10(k) decisions that were made within a few years after *CBS* and *Jones*. The courts could be expected to give greater deference to Board decisions during the period in which the Board's decisionmaking process was developing. The time has come, however, for the Board to accord a measure of weight to its past decisions and to establish some rational principles governing the weight that it gives to the various factors it considers in §10(k) hearings. In short, there is need for a good recipe for the stew.

We do not doubt the Board's ability to make principled decisions in this area. It has successfully done so in other areas in which the law also gives it wide discretion. It can do so here if it will. We think that it must. Its prior decisions in §10(k) cases can give some guidelines.

Most observers who have systematically studied the Board's §10(k) decisions agree that the Board's statement that no factor is necessarily more important than any other is simply false. Our own independent review of the Board's §10(k) decisions reveals that the commentators are correct in concluding that the Board's work award coincides "in virtually every case" with the employer's preference.[7] Moreover, the Board's consistent reliance upon employer preference is not the only observable decisionmaking pattern. Whenever the Board determines that a collective

[7]C. Morris, *The Developing Labor Law*, 1972 Supplement at 136 (1972). This is a consistent occurrence despite the Board's protestations that employer preference is only one factor among the many to be considered. See *Local 38, IBEW (Cleveland Illuminating Co.)* 137 N.L.R.B. 1719, 1722 (1962). Every survey undertaken of Board §10(k) decisions bears out this conclusion. See Atleson, *supra*, note 6 at 117, 151-52; Collister, *supra*, note 5 at 57-58; Gitlow, Technology and NLRB Decisions in Bargaining Unit and Jurisdictional Dispute Cases, 16 Lab. L. J. 731, 745 (1963); Johns, *supra*, at 52; O'Donoghue, *supra*, note 5 at 314; Note, Jurisdictional Disputes Since the CBS Decision, 39 N.Y.U. L.Rev. 657 (1964); ABA Section of Labor Relations Law: Report of the Committee on Development of Law under NLRA, 1964 at 124; 1965 at 445; 1967 at 99; 1968 at 110; 1970 at 97.

bargaining contract clearly and unambiguously binds an employer to one (and only one) union, then that union is almost invariably awarded the work.[8]

We do not quarrel with the Board's consistent reliance upon employer preference, collective bargaining contracts and to a lesser degree other factors. More often than not, other factors deemed relevant by the Board, such as skill, efficiency, safety and employee integration, are factors that the employer himself has relied upon in making his work assignment.[9] Indeed, though the Board purports to rely upon its own evaluation of factors such as skill, efficiency and safety, it is often apparent that the employer's evaluation of these factors influences the Board.[10] Furthermore, by giving significant weight to the employer's preference, the Board anticipated the Supreme Court's recognition of the critical stake that the employer has in the outcome of jurisdictional disputes. See *NLRB v. Plasterers' Union, supra*, 404 U.S. at 124-25, 130. In deferring to clearly and unambiguously applicable collective bargaining agreements, the Board also promotes the policies of the Taft-Hartley Act. By recognizing the importance of collective bargaining agreements, the Board enables union and management to provide for the stable and predictable settlement of labor disputes, through arbitration and otherwise. See *Id.* at 133, 136-37; *Carey v. Westinghouse*, 1964, 375 U.S. 261, 266.

What we do object to is the Board's refusal to acknowledge the extraordinary importance of these two factors in its §10(k) decisionmaking process. As we have said, the failure of the Board to establish any standards precludes viable judicial review. The case before us is a good example of the problems created by standardless decisionmaking.

The Board's work award to the Engineers conflicts with two of the factors that the Board often relies upon. It is possible, of course, that the Board may think that the Engineers should get

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[8]See generally surveys *supra* note 7 and cases cited therein. The Board has a firm policy that collective bargaining contracts will be deemed persuasive in §10(k) hearings only if they clearly and unambiguously assign the work. See *37th Annual Report of the NLRB for the Year Ending June 30, 1972* at 124.

[9]See Johns, *supra*, at 52-53.

[10]See, *e.g.*, *Local 10, Bricklayers, Masons, Plasterers, Marble, Tile and Terrazo Workers (Unistress Corp.)* 198 N.L.R.B. No. 67 (1972).

the work despite the PMA-Longshoremen contract and the employers' preference. On the other hand, the Board may determine that in light of the correct interpretation of the contract, the factors of skill, efficiency, safety, acquiescence and past practice are not controlling. Our reversal of the Board's conclusion as to the applicability of the contract precludes us from sustaining the Board's work assignment in this case. The Board must be given the first opportunity to use its accumulated expertise and make a principled rather than an arbitrary award of the work in light of the correct construction of the contract.

In exercising this discretion, it will not suffice for the Board again to merely list the relevant factors and then come to a conclusion without explaining why it comes to that conclusion. The Board must explicitly recognize that it has traditionally given importance to such factors as employer preference and collective bargaining contracts, absent countervailing circumstances, in its past decisions. In doing so, a body of precedent will be (and in reality has been) developed from which intelligible decision-making standards will emerge. The Board may still evaluate each jurisdictional dispute on its own merits and it need not be limited by a rigid set of standards or principles. But when the Board decides that certain factors take precedence over others, it must explain why and reconcile its decisions with its past judgments. Otherwise, §10(k) will not bring the desired stability to the process by which jurisdictional disputes are resolved, and the courts will be unable to determine whether or not the Board's decisions are arbitrary and capricious.

In this case the only applicable collective bargaining agreement assigns the disputed work to the Longshoremen. The employers also appear to prefer that the work assignment go to the Longshoremen. In light of the Board's policy of giving controlling weight to these factors under similar circumstances, we are unable to conclude, absent convincing reasoning from the Board to the contrary, that the Board's work assignment to the Engineers is not arbitrary and capricious.

In No. 72-1908, the Board's petition for enforcement is denied. In Nos. 72-2263 and 72-2315, the petitions for review are granted, the Board's order is set aside, and the case is remanded to the Board for further proceedings consistent with this opinion.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 9-9-74—480

APPENDIX

181 NLRB No. 51 D-3708
Portland, Ore

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR
RELATIONS BOARD

INTERNATIONAL LONGSHOREMEN'S
& WAREHOUSEMEN'S UNION, LOCAL NO. 50

and Case 36-CD-54

HOISTING AND PORTABLE ENGINEERS,
LOCAL NO. 701, INTERNATIONAL
UNION OF OPERATING ENGINEERS,
AFL-CIO

and

BRADY-HAMILTON STEVEDORE COMPANY
AND WILLAMETTE-WESTERN CORPORATION

INTERNATIONAL LONGSHOREMEN'S
& WAREHOUSEMENT'S UNION, LOCAL NO. 50

and Case 36-CD-54-2

HOISTING AND PORTABLE ENGINEERS
LOCAL NO. 701, INTERNATIONAL
UNION OF OPERATING ENGINEERS,
AFL-CIO

and

W. J. JONES & SON, INC. AND
GENERAL CONSTRUCTION COMPANY

HOISTING AND PORTABLE ENGINEERS
LOCAL NO. 701, INTERNATIONAL
UNION OF OPERATING ENGINEERS,
AFL-CIO

and Case 36-CD-55

PACIFIC MARITIME ASSOCIATION

DECISION AND DETERMINATION
OF DISPUTE

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following the filing of charges in Case 36-CD-54, on April 3, 1969, and in Case 36-CD-54-2, on April 23, 1969, by Hoisting & Portable Engineers Local No.701, International Union of Operating Engineers, AFL-CIO, herein called Engineers; and in Case 36-CD-55 on April 21, 1969, by Pacific Maritime Association, herein called PMA. Brady-Hamilton Stevedore Company, herein called Brady, and Willamette Western Corporation, herein called Willamette, are the co-employers involved in Case 36-CD-54; and W. J. Jones & Son, Inc., herein called

Jones, and General Construction Company, herein called General, are the employers involved in Case 36-CD-54-2. The charges allege that International Longshoremen's & Warehousemen's Union Local No. 50, herein called Longshoremen, and Engineers, violated Section 8(b)(4)(D) of the Act. Pursuant to notice, a hearing in the consolidated proceeding was held on June 3, 4, 5, 6, 9, 10; July 7, 8, 9, 10, and 11; and August 4, 5, 6, 7, and 8, 1969, in Portland, Oregon, before Richard V.Stratton, Hearing Officer.[1/] Brady, Jones and PMA, the Longshoremen, and the Engineers appeared at the hearing, and were afforded full opportunity to be heard, to examine and to cross-examine witnesses, and to adduce evidence bearing on the issues. The Unions and PMA filed briefs with the

1/ General and Willamette made no appearance at the hearing and took no official position.

National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing, and finds that they are free from prejudicial error. They are hereby affirmed. Upon the entire record in this case, the Board makes the following findings:

I. The Business of the Companies

PMA, a California corporation, is an association of steamship and stevedoring companies engaged in, among other things, the handling of cargo in and out of vessels and barges at ports on the West Coast. Brady and Jones are stevedore companies with main offices in Portland, Oregon, performing services in Astoria, Oregon. Both are members of PMA. It was

stipulated that Jones, Brady and PMA on behalf of its employer-members, each annually perform stevedoring services for shipping companies sailing in intercoastal or international waters valued in excess of $50,000, and that said shipping companies annually do a gross volume of business in excess of $500,000.

General and Willamette are employers engaged in the construction industry with offices in Portland, Oregon. Each annually conducts business outside the State of Oregon in excess of $50,000.

We find, accordingly, that the Employers are engaged in commerce within the meaning of the Act and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organizations Involved

The parties stipulated, and we find, that the Engineers and the Longshoremen

are labor organizations within the meaning of Section 2(5) of the Act.

III. The Dispute

A. The Work in Dispute

The dispute concerns the work of operating barge-mounted floating whirly-type steam cranes in the Port of Astoria, Oregon, lifting bundles of logs, weighing from 25 to 45 tons each, from the water and placing them into the hold of a ship or barge. There are two jobs involved, the crane operator's job and the fireman's or engineer's job.

B. The Facts

The Unions claiming the work described above are the Engineers and the Longshoremen. From 1947 to 1964, only the Engineers loaded logs in Astoria, Oregon, using a locomotive crane. From 1964 until April 3, 1969, only the Engineers loaded logs in Astoria, using floating cranes. Prior

to the introduction of floating cranes in 1964, Astoria had been considered a depressed port. Since then, the loading of logs at Astoria, for shipment primarily to Japan, has rapidly increased. To expedite the loading operation, the stevedore companies, Brady and Jones, leased waterborne whirly cranes from Willamette and General. These cranes were leased complete with operator and fireman, all of whom were members of the Engineers. The Longshoremen raised no jurisdictional claim until an unrelated dispute in Portland brought the matter of the manning of the cranes to the fore. Then, on April 3, 1969, the Longshoremen struck the Port of Astoria demanding that the work of operating the floating cranes be taken away from the Engineers and given to them. The stevedore companies who were members of PMA which had a contract with the Longshoremen up and

down the West Coast, then assigned the work to the Longshoremen. A subsequent arbitration award between Longshoremen and PMA, to which the Engineers was not a party, confirmed that action.

Although most of the Longshoremen had experience operating ships' winches, none had any experience operating a floating crane. Nevertheless, some were put to work operating these cranes without any training. Others were given a half day to 4 days' training, with a half day classroom instruction, under a training program instituted after April 3 by PMA and the Longshoremen.

After the adverse arbitration award, the Engineers demanded that the stevedore companies assign the work back to them. In furtherance of this demand they picketed the Port of Astoria, from April 22, 1969, until they were enjoined by the U.S.

District Court for the District of Oregon.

Several months after the assignment of work to the Longshoremen, not all of the floating cranes were back in operation, and some of the log loading usually done by the cranes was being done by ships' winches while the PMA-Longshoremen training program continued.

C. Contention of the Parties

PMA and its members Brady and Jones take the position that the work should be assigned to the Longshoremen both by virtue of its relation to the normal waterfront longshore work and because the work allegedly is covered by a Board certification and by the labor agreement between PMA and Longshoremen. The Engineers claim that they have been doing the work for the past 5 or 6 years, that it is covered by the Engineers' contract to which Willamette and General are parties and

that Engineers possess superior skill in operating cranes, and perform the work in a more economical and a safer manner. The Longshoremen, however, claim that they are equally skilled in the operation of cranes, operate them as safely or more safely, and that the work involves cargo loading which is traditionally their work. They also claim prior 10(k) awards covering the same or similar work.

D. Applicability of the Statute

Before the Board proceeds with a determination of dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. As stated above, the uncontroverted record testimony establishes that the Longshoremen engaged in a work stoppage bringing the log-loading operation in Astoria to a complete halt. It is further

established that the object of this conduct was to force the stevedore companies to assign the work of operating the floating cranes to them rather than to the Engineers. It is also established that the Engineers, who were discharged when the work was reassigned to the Longshoremen, picketed the Port of Astoria in furtherance of their demand that it be assigned back to them. Accordingly, we find that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) of the Act has occurred, and that the dispute is properly before the Board for determination under Section 10(k) of the Act.

IV. Merits of the Dispute

Section 10(k) of the Act requires the Board to make an affirmative award of the disputed work after giving due consideration to various relevant factors. 2/

2/ N.L.R.B. v. Radio Television Broadcast Engineers Union Local 1222, International

Traditionally, members of the Longshoremen have engaged in loading and unloading cargo at ports on the West Coast and other ports of the United States. 3/ However, members of the Engineers, not the Longshoremen, have always from 1964 until April 1969 operated the floating cranes in Astoria, and the Longshoremen have long acquiesced in this assignment. Prior to 1964, Astoria was a depressed port. From

Brotherhood of Electrical Workers (Columbia Broadcasting System), 364 U.S. 573; International Association of Machinists, Lodge No. 1743, AFL-CIO (J.A. Jones Construction Co.), 135 NLRB 1402, 1411.

3/ See General Truck Drivers, Chauffers, Warehousemen & Helpers, Local 270 (W.L. Richeson & Sons, Inc.), 166 NLRB No.115; International Longshoremen's and Warehousemen's Union and Local 4, International Longshoremen's and Warehousemen's Union (Aluminum Company of America), 158 NLRB 1024; International Longshoremen's Association, Great Lakes District, AFL-CIO, and International Longshoremen's Association, Local 2000, AFL-CIO (Lawrence Erie Company), 158 NLRB 1687

1946 to 1964, there was only one locomotive crane loading cargo and logs, which was always and solely operated by members of the Engineers. From the time the floating cranes first came to Astoria in 1964 until April 3, 1969, when the Longshoremen struck the port, the floating cranes were always operated by the Engineers.

PMA and the Longshoremen claim that the work in dispute is covered by a certification, based on Ship Owners' Association of the Pacific Coast, et al., 7 NLRB 1002, a 1938 case in which the Board certified the alleged predecessor of the Longshoremen as the representative of "the workers who do longshore work in the Pacific Coast ports of the United States for the companies which are members of" specified employer associations allegedly the predecessors of PMA. However, that certification was issued before the advent of the barge-

mounted floating crane. In addition, the record shows that all post-certification contracts between those parties and their successors limited the broad language of the certification by excluding some work from the unit covered. Recent PMA-Longshoremen contracts provide that "All machinery, equipment, and other tools now or hereafter used in moving cargo shall be operated by longshoremen when used in an operation covered by this Agreement and the operation thereof is assigned to longshoremen and is covered by this Agreement," with certain exceptions. One of the exceptions specified is the operation of cranes mounted on floating crane barges. Moreover, PMA has heretofore contended at all times that a floating crane is not a longshoremen's tool.

On the other hand, the labor agreement between the Engineers and Willamette and

General includes under Article II, "Work Affected Defined," the following language:

> ...including operation, maintenance, and repair of land and floating plant equipment, vehicles and other facilities used in connection with the described work and services, and all other work of similar nature.

The Longshoremen's claim that they are equally skilled in the operation of these cranes as the Engineers appears to be without foundation. On April 3, 1969, there were 11 operators and 10 firemen, members of the Engineers, working the floating cranes in Astoria. Each was a skilled craftsman with up to 6 years of training and experience on land and floating cranes, having served long apprenticeships as firemen before becoming operators. The record also reveals without contradiction that on April 3, 1969, there was no member of the Longshoremen who had ever operated either a floating or a land crane, with the exception of one who had operated

a land crane for 2 days. No Longshoremen had any experience firing the boilers of these steam cranes. At the present time, while the floating cranes are being operated by members of the Longshoremen, the stevedore companies are forced to hire outside repairmen at considerable expense to maintain the floating cranes, since the Longshoremen firemen, unlike the firemen members of the Engineers, are unable to do so, having had no experience in maintaining, servicing or rebuilding cranes. Although, there are in evidence 22 reports of accidents occuring during the 5 years that the Engineers operated the floating cranes in Astoria, no accidents could be attributed to their negligence. However, since April 3, with fewer cranes in operation, manned by the Longshoremen, a boom has been bent, a window in a main enginehouse broken, a barge's torque converter has

been damaged, and a load dropped, all of which may be attributed to crane operations.

Prior Board cases [4/] in which the Longshoremen claim they were awarded the same or similar type of work are distinguishable. These prior cases did not involve floating cranes, but rather various types of land cranes, which require much less experience, skill and delicacy of touch and feel. Moreover, they did not involve specific work which, over the course of a number of years, had continuously and consistently been performed by employees represented by another labor organization. The work in dispute is just such work.

In light of the above, we conclude that

4/ United Industrial Workers (Albin Stevedore), 162 NLRB No. 96; ILWU (Howard Terminals), 147 NLRB 359; ILWU (Albin Stevedore), 144 NLRB 1443; ILWU (American Mail Line), 144 NLRB 1432; ILWU (Pacific Maritime Association), 137 NLRB 119.

the relevant factors support the Employers' original assignment of this work to employees represented by the Engineers, and that the employees are entitled to the disputed work. We shall therefore determine the dispute in their favor.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board hereby makes the following determination of dispute:

1. Employees who are currently represented by Hoisting and Portable Engineers Local No. 701, International Union of Operating Engineers, AFL-CIO, are entitled to perform the work of operating barge-mounted floating whirly-type cranes lifting bundles of logs from the water and

placing them into the holds of ships and barges at Employers' Astoria, Oregon, operations.

2. International Longshoremen's & Warehousemen's Local No. 50 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require the Employers to assign the above work to longshoreement represented by it.

3. Within 10 days from the date of this Decision and Determination of Dispute, International Longshoremen's & Warehousemen's Local No. 50 shall notify the Regional Director for Region 36, in writing, whether it will or will not refrain from forcing or requiring the Employers, by means proscribed by Section 8(b)(4)(D) to assign the work in dispute to longshoremen, rather than to employees of the Employers who are represented by Hoisting and Portable

Engineers Local No. 701, International
Union of Operating Engineers, AFL-CIO.
Dated, Washington, D.C. 2/26/70

Frank W. McCulloch, Chairman

John H. Fanning, Member

Howard Jenkins, Jr., Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)